



Decision

Matter of: Jeffrey Allen

File: B-250379.2

Date: June 30, 1993

DIGEST

An employee stationed overseas may not receive educational allowances for his four children who reside with their mother, the employee's former wife, in Little Rock, Arkansas, where they attend a private school. Educational allowances are provided only to reimburse employees stationed at foreign posts of duty the extraordinary and necessary expenses they incur to educate their children. While by mutual consent of the parties, the legal custody of the children was changed from the mother to the employee to meet technical provisions of authorizing regulations, the children's living arrangements and residence remained unchanged. Also, the employee's decision to send his children to a private school instead of the Little Rock public schools is personal to the employee, and not incident to his service overseas.

DECISION

An authorized certifying officer for the U.S. Agency for International Development (AID)¹ requests an advance decision on Mr. Jeffrey Allen's claim for education allowances for his four children of a prior marriage who reside with their mother in the United States during the school year. We conclude that the claim may not be paid.

BACKGROUND

AID assigned Mr. Allen to its offices in Rabat, Morocco, in April, 1992, where he continues to live with his current wife. Mr. Allen has four children from a previous marriage.² Apparently, his former wife had custody of the children until, in April 1990, by mutual consent, Mr. Allen

¹Mr. N. Keith Romwall, Controller, USAID/Rabat.

²Mr. Allen also has a stepson, his current wife's son, who apparently attends school in El Salvador, but he is not a subject of the certifying officer's questions.

obtained a court order granting him "primary custody" of these children with the mother receiving "reasonable visitation" rights.¹ Although there is adequate schooling available at Mr. Allen's post in Rabat, the children continue to live with their mother in Little Rock, Arkansas, during the school year. Apparently they spend at least part of the Summer break with Mr. Allen.

Each of the four children, currently ages 10 to 18, attends a private, non-residential school in Little Rock for which Mr. Allen has claimed total education allowances of \$31,200 for the 1992-1993 school year.⁴

The agency questions whether Mr. Allen is entitled to the education allowances to cover private school tuition and fees since the children are entitled to a free public education in Little Rock, and whether Mr. Allen is entitled to allowances for room and board since the children live with their mother.

OPINION

Under 5 U.S.C. § 5924(4), an education allowance or payment of travel costs may be granted to assist an employee stationed overseas with the "extraordinary and necessary expenses" incurred in providing "adequate education for his dependents" because of his service in a foreign area. The educational allowance is not to exceed the cost of obtaining "educational services as are ordinarily provided without charge by the public schools in the United States," and where adequate schools at the employee's post are not available, the statute also authorizes payment for room and board and transportation between the post and the nearest locality where adequate schools are available. 5 U.S.C. § 5924(4)(A). Implementing regulations issued by the Department of State⁵ are found at Chapter 270 of the

¹According to the record, the local courts in Arkansas use the term "primary custody" interchangeably with "sole custody".

⁴This includes \$9,500 for tuition (\$3,000 per annum for the first two children and \$1,750 per annum for other two), \$14,000 for room and board (\$350 a month for ten months for each of his children), \$1,900 in miscellaneous expenses (books, fees and building fund) and \$5,800 in travel costs.

⁵Section 5922(c) of title 5, United States Code, authorizes the President to prescribe regulations related to the payment of overseas allowances and differentials. By Executive Order No. 11137, Jan. 7, 1964, as amended, this authority has been delegated to the Secretary of State.

Standardized Regulations (Government Civilians, Foreign Areas), Nov. 1, 1992.

Mr. Allen argues that by virtue of the change in legal custody, his children meet the exception contained in provisions of the Standardized Regulations that provide that educational allowances "shall not be paid for a child in the U.S.: (1) who has a natural . . . parent residing in the U.S. (except where the employee establishes that the parent residing in the U.S. is divested of legal custody of the child" SR § 276.3, Change 487, Nov. 11, 1992. See also SR § 277.2b to the same effect concerning room and board.

Because he now has legal custody of his four children, Mr. Allen asserts, he should not be disqualified from receiving education allowances simply because the children live with their mother while attending school. However, to qualify for allowances under the Standardized Regulations, Mr. Allen must establish both his legal status as his children's custodian and that his children actually reside with him. This is so because the Standardized Regulations also provide that to be a family member within the meaning of the regulations, the person must reside at the employee's post. SR para. 040(m), Change 421, Sept. 27, 1987. When a child is attending school away from post it must be established that, except during the period of attendance at school away from post the child would normally reside with the employee/parent at post. SR § 276.22, Nov. 1, 1992. See also B-129962, Nov. 17, 1976.

Where parents have made mutual arrangements regarding the residence of their children, we have looked beyond the face of the custody decree to determine the children's actual residence based on the facts of the particular case. Earnest P. Gianotti, 59 Comp. Gen. 450 (1980).⁶

⁶In Gianotti, the couple had joint custody of their children, rather than "primary" custody. The case involved an employee stationed at the Trust Territory of the Pacific Islands (where adequate schools were not available) whose ex-wife lived in Montana. Based on the definition of "family" described above, we concluded that the employee could not claim an education allowance for the children while they resided with their mother, but we approved allowances for his children to attend a preparatory school in Hawaii after a court awarded Mr. Gianotti full custody of his children and they established a residence with the father at the overseas post. See also Senior Chief Petty Officer Lawrence Stallard, USN, B-213684, June 26, 1984, which involved a military family separation allowance, but
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In this case, the employee states that the children "normally reside with me when they are not in school." However, the record includes no evidence that the children ever intended to establish their residence in Rabat and, in fact, the change in legal custodial status did not alter their established living pattern of residing with their mother during the school year and visiting their father during the Summer break. See Gianotti, supra at 459. In these circumstances, we believe it would stretch the term "normally reside" beyond its plain meaning to conclude that children who are physically present in their mother's home 10 months of the year do not normally reside there because of the change in legal custody.

As Mr. Allen indicates, the change in legal custody technically meets the requirement of the exception provisions in sections 276.3 and 277.2b of the regulations. However, we do not believe that the record establishes that his situation falls within the overall scheme of the regulations implementing the statute, the stated purpose of which is to assist with the extraordinary and necessary expenses incurred in providing adequate education because of the employee's service in a foreign area. Instead, the expenses for which he seeks the allowances appear to be the normal living expenses of his children residing with their mother and the cost of attending a private school that Mr. Allen and the children's mother prefer over the Little Rock public schools. Accordingly, we conclude that Mr. Allen is not entitled to the allowances he claims and payment is denied.

Seymour Efron

~~For~~ James F. Hinchman
General Counsel

CIVILIAN PERSONNEL
Compensation
Overseas personnel
Educational allowances
Eligibility

'(...continued)
like this case, required a determination of the custodial status of the employee's children.